COURT FILE NO.: 14-2022
DATE: 2015/10/26

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Association of Professors of the University of Ottawa (APUO), Applicant

AND:

University of Ottawa, Respondent

BEFORE: Justice R. Scott

COUNSEL: Sean McGee, Counsel for Plaintiff

Lynn Harnden and Celine Delorme, Counsel for Respondent

HEARD: October 18, 2015 in Ottawa

ENDORSEMENT

[1] The Association of Professors of the University of Ottawa ("APUO") has filed an application for judicial review seeking to set aside the award of Arbitrator Foisy of January 27, 2014, which dealt with three grievances dealing with the dismissal of Denis Rancourt, a tenured Professor at the said University.

[2] To this end, APUO filed the affidavit of Natasha Udell ("Udell") who as a lawyer was part of the legal team representing Professor Rancourt at the hearing before Arbitrator Foisy.

[3] The Respondent University seeks by its interim motion to set aside as inadmissible all or part of the Udell Affidavit.

[4] Professor Rancourt, of the Physics Department ran afoul of his principals initially in November of 2007 for not teaching the content of an approved course, Science in Society, and not providing an objective evaluation of students'

performance in relation to a course entitled Principles of Physics II. Lastly, the Professor was terminated by the University on March 31, 2009 for a number of reasons including not having graded his students objectively in yet another physics course in which all of his students received an A+.

[5] In his decision, on January 27, 2014, Arbitrator Foisy allowed the first grievance but dismissed the second and third grievance, the latter award upheld the termination of the Professor's employment with the University of Ottawa.

[6] In its Application for Judicial Review of May 7, 2014, the APUO seeks to have Arbitrator Foisy's award quashed for the following reasons:

i) He failed to appropriately assess and apply the principles of academic freedom to the facts before him;
ii) He inappropriately relied on a report prepared by Maureen Robinson who was hired by the University to work with the Professor under questionable circumstances. Ms. Robinson prepared a report which allegedly summarized the Professor's public statements about his A+ grading scheme;
iii) He failed or refused to take into account, the evidence of the Dean of the Faculty of Science who testified about the parameters allowed the Professor when grading students;
iv) He unreasonably concluded that the Professor awarded the A+ grades to his students on the first day of class without any evaluation; and
v) He unreasonably determined that the Professor should be terminated.

[7] In support of its Application for Judicial Review, the APUO filed the thirty (30) paragraph, seven (7) page, Udell Affidavit sworn April 30, 2014.

[8] By way of comment as to the complexity of the hearing before Arbitrator Foisy, it is noted from the materials filed that the twenty-eight separate dates stretched over more than a two year period and conducted, at different times, as was usual and agreed to by the parties and the Arbitrator, in both official languages.

[9] The proceedings were not recorded in any formal sense.

[10] The sole issue in this motion is to determine whether the Udell Affidavit should be allowed before the Divisional Court panel on the eventual Judicial Review.

THE LAW

Section 2(3) of the *Judicial Review Procedure Act*, R.S.O. 1990, c.J.1 reads as follows:

> "(3) Where the findings of Fact of a tribunal made in the exercise of a statutory power of decision are required to any statute or a law to be based exclusively on evidence before it and on Facts of which it may take notice and there is no such evidence and are no such Facts to support findings of Fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review."

[11] The leading case on the admissibility of affidavit evidence upon a Judicial Review is *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (Ont C.A.) ("*Keeprite*"), at paragraph 27 in *Keeprite*, Justice Morden wrote:

> ". . . the practice of admitting affidavits of this kind should be very exceptional, it being emphasised that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for legitimate use of affidavit evidence to demonstrate the

> exacting jurisdictional test of complete absence of evidence on an essential point would, indeed by rare."

[12] A more recent case involving similar issues is that of *1424455 Ontario Limited, carrying on business as Utilities Kingston* (Applicant) *and the International Brotherhood of Electrical Workers, Local 636 and Deborah Leighton* (Respondents), 251 O.A.C. 62 (Div. Ct.) ("*Utilities Kingston*"). Therein Justice Swinton wrote as follows at paragraph 18:

> "The *Keeprite* standard for the admission of affidavit evidence on judicial review has been applied in numerous decisions involving labour boards and labour arbitrators. These cases have held that affidavit evidence can be admitted either to show an absence of evidence on a essential point or to disclose a breach of natural justice that cannot be proven by a mere reference to the record."

[13] The Court in *Kingston Utilities* further refined the test enunciated in Keeprite at paragraph 37 which reads:

> "The motions judge was bound by the decision in Keeprite. Therefore before admitting such evidence, she had to ask, first, whether the affidavit material showed there was "no evidence to support a finding of fact". Second to be admissible, the evidence must relate to a Fact that is essential to the decision."

[14] The Udell Affidavit is attached as Appendix 'A' to this decision for ease of reference and, it may be divided into three (3) main areas for consideration of the issues namely; paragraphs three (3) through thirteen (13) inclusive deal with the Maureen Robinson issue, paragraphs fourteen (14) through twenty-three (23) inclusive deal with certain admissions by Dean Lalonde, and, paragraphs twenty-sex (26) through twenty-eight (28) inclusive deal with the testimony of the two students P and V at the hearing.

MAUREEN ROBINSON

[15] The circumstances of Maureen Robinson's involvement in this entire matter is troubling at best. Throughout the relevant portion of the Award by Arbitrator Foisy, Ms. Robinson's written notes were referred to "the report on Professor Rancourt's address prepared by a University of Ottawa student"

[16] Pursuant to the Udell Affidavit, and based on evidence from the hearing, the student being Maureen Robinson was the editor of the student newspaper who had been hired by the University in what the University described as in a clerical capacity to assist Professor Rancourt in his office, without his input on her hiring.

[17] Either in consultation with her employer, the University, or on her own, she monitored the activities of Professor Rancourt both on and off campus and reported her finding back to the University. In an email to Dean Lalonde, she admitted to having a "personal grudge" against Professor Rancourt and went so far as to liken her monitoring of Professor Rancourt as "posing as a young girl to catch a pedophile". Ms. Robinson was not called as a witness at the hearing and, the parties agreed that her "report" would be considered as an "aide memoire" only.

[18] The University referred to the "report" thereafter as a transcript which such description was objected to by the APUO. Similarly, Arbitrator Foisy made certain findings which appear to be based solely on the report which was not evidence.

[19] Given the unique circumstances, paragraphs 3 – 13 are necessary and in keeping with *Keeprite* and *Kingston Utilities*, this affidavit evidence should be admitted on the judicial review to "show an absence of evidence on an essential point".

DEAN LALONDE'S CROSS-EXAMINATION AND THE TESTIMONY OF STUDENTS P AND V

[20] It is difficult to separate the input of the evidence or lack of evidence of Ms. Robinson and the circumstances of her somewhat bizarre involvement in this matter, from the other areas of concern identified by the Applicant, APUO.

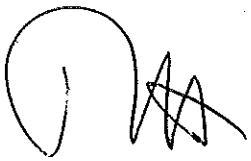
[21] Under the circumstances, it is my opinion, this is the "rare" exception envisaged by the case law whereby it will be necessary for the Divisional Court Panel to have before it evidence from the original hearing on which the Arbitrator made his findings. In addition, the lack of recording in this particular case requires that affidavits such as that of Natasha Udell be provided to the panel.

[22] In my role on this motion, I find that the panel will ultimately be tasked with accepting or not accepting the contents of the affidavits. To exclude such affidavit materials in this isolated situation would be too prejudicial to the arguments that the Applicant, the APUO, wishes to advance.

[23] The Respondent, University, shall be allowed ninety (90) days to file an evidentiary affidavit. Of course, the parties are entitled to cross-examination on the said affidavits.

The motion is dismissed.

Costs are to the APUO. Should the parties not be able to agree as to costs, I would ask that they speak with my assistant in the Belleville Courthouse to arrange a timetable for written submissions.



Justice R. Scott

Date: October 26, 2015

APPENDIX A

Court file number

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

ASSOCIATION OF PROFESSORS OF THE
UNIVERSITY OF OTTAWA (APUO)

APPLICANT

AND

UNIVERSITY OF OTTAWA

RESPONDENT

AFFIDAVIT OF NATASHA UDELL

I, Natasha Udell, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am counsel for the Association of Professors of the University of Ottawa (APUO). As such, I have personal knowledge of the matters stated in this affidavit unless otherwise stated to be on the basis of information and belief.

2. I attended the following arbitration dates during which the events described in the affidavit occurred: May 2, 2011, October 12, 2011, October 31, 2011, November 1, 2011, January 23 and 24, 2012, February 21, 2012, April 10, 11, 12 and 13 2012, May 13, 14, 15, 21, 22, and 23, 2013, June 11, 1, 13, 25 and 26 2013.

Presentation at Queen's University

3. During the cross-examination of Professor Denis Rancourt, he was questioned about notes made about his speech delivered at Queen's University on October 18, 2007 (the "Summary").

4. Counsel for the University of Ottawa advised at the arbitration that the Summary was the product of Maureen Robinson. Ms. Robinson was not called to testify.

5. Ms. Robinson was a student and also employed by the University of Ottawa. During her employment, she monitored Professor Rancourt's activities, both on and off campus, and reported back to the representatives of the University. Professor Rancourt testified that Ms. Robinson was hired to spy on him, and noted that in emails she wrote to Dean Lalonde that she had a "personal grudge" against Professor Rancourt.

6. When counsel for the University first attempted to enter the Summary as an exhibit, the Applicant objected. The parties agreed that the document would not be admitted for the truth of its content, but as an *aide memoire* for the Arbitrator and to put in context his notes on the questions asked of Professor Rancourt. The Arbitrator incorporated this agreement into an oral ruling.

7. Over the course of the hearing, counsel for the University repeatedly referred to the Maureen Robinson Summary as a transcript in spite of the objections of the Applicant.

8. During his cross-examination, Professor Rancourt reviewed the Maureen Robinson Summary. After doing so, Professor Rancourt indicated that it was not complete. He testified

that the presentation had lasted more than three hours and many explanations he made about his grading method were missing from the Summary.

9. The speech at Queen's occurred in the Fall of 2007. The evidence before the Arbitrator was that the marks in PHYS 1722 were submitted the previous June. The talk was fully one year before PHYS 4385/5100.

10. Professor Rancourt also testified that while he may have made statements similar to those in the Maureen Robinson Summary, the wording and the tone did not accurately reflect the presentation. He also stated that many other statements made by him during the presentation qualified the points in the Summary. Professor Rancourt emphasized that the very important context in which the points of the Summary were made was missing from the Summary.

11. Professor Rancourt further testified that his comments during the Queen's speech were meant to arouse interest in his teaching methods and to push the limits. His goal was not to describe exactly what had happened in any class. Instead he was attempting to be provocative and bring the concepts to life.

12. Professor Rancourt emphasized during his testimony that he did not intend to mislead the audience and that, considered in the context of the entirety of the speech itself, he had spoken the truth.

13. With regards to the statement that he had not graded since implementing his new teaching method, Professor Rancourt explained that he was referring to traditional grading (which he equated to providing a rank order of students against one another). He was engaged in "non-

grading", which referred to using the evaluation method he had developed, which centered on individual progress and student engagement.

Cross-Examination of André Lalonde

14. During the cross-examination of the Dean of Science, André Lalonde, Dean Lalonde stated that in evaluating students a professor is obliged to determine objectively whether or not a student satisfies or does not satisfy the requirements of the course. He admitted this did not include an obligation to rank students in terms of their ability to perform academically in the course.

15. Dean Lalonde clarified this point by confirming that the University of Ottawa does not require that the grades in a class be spaced on a bell curve – that is, there is no requirement that a certain proportion of students receive a certain grade. Nor is there a set mark or range of marks within which the class average must fall.

16. Dean Lalonde also confirmed that there is no requirement at the University of Ottawa that prevents a professor from giving all students in a class the same grade, if that is what was earned.

17. In his testimony regarding PHYS 1722, Dean Lalonde confirmed that he had no information or evidence that Professor Rancourt did not teach the subject matter as set out in the course description. During the hearing, counsel for the University stated the Respondent was taking no issue with Professor Rancourt's teaching methodology.

18. Dean Lalonde admitted it was not against University policy for a professor to create a contract of expectations with each student and then to meet with each student regularly to assess the student's progress and expectations throughout the course against that agreement.

19. Dean Lalonde testified that to his knowledge, Professor Rancourt utilized a final exam, a mid-term exam, homework assignments and other methods of grading when evaluating PHYS 1722.

20. Dean Lalonde admitted he could not identify any student in PHYS 1722 that did not deserve the grade they were assigned. Nor could he identify a student that was not evaluated objectively.

21. Dean Lalonde confirmed that Professors are allowed to grade on a wide number of factors including, among others, attendance and participation in class. He also confirmed that, to his knowledge, there was no regulation regarding the maximum proportion of a grade that could be assigned to each of these factors.

22. Dean Lalonde agreed that, so long as a professor respected the requirement that there be an objective evaluation, it was a professor's right to determine which of the various factors would be used in the evaluation of students and the weight given to each factor.

23. With regards to the grades assigned by Professor Rancourt in PHYS 1722 and PHY 4385/5100, Dean Lalonde confirmed that the grades were approved by the Chairman of Professor Rancourt's academic unit (Department of Physics) and the grades were not changed.

Denis Rancourt's Methodology

24. Professor Rancourt provided extensive testimony over twelve days and he spoke at length about his methodology. He explained how his choice of teaching method was integrated into the classroom. He would evaluate students in every class as well as in one-on-one sessions to ensure that the students were performing and progressing at the level to justify their grade.

25. Professor Rancourt further testified that when a student was struggling or not performing at the required level, he would intervene with that student and work with him or her to ensure the student's work improved. He testified that these interventions occurred throughout the term and continued into the final exam period at which time if a student's performance was in question, he met with the student individually to perform a supplemental evaluation in discussing the student's final exam.

Student P and Student V's Testimony

26. Although Student P initially testified in chief that Professor Rancourt had said all students would be getting an A+, during cross examination, he accepted that Professor Rancourt might have said it was possible for everyone to get an A+ in the course in the sense that it was his expectation.

27. Professor Rancourt testified that was exactly what was said. He went on to testify that he made it clear that this expectation was qualified by the expectation of the work and contribution each made to the classes as well as evaluations throughout the course

28. Student V also testified in chief that Professor Rancourt had promised each student an A+. During cross-examination, Student V acknowledged he could not remember exactly what was said. When it was suggested that Professor Rancourt told the class he expected that each student would excel and it was possible for everyone to get an A+, Student V said he did not recall, but believed the expression A+ was used and that it was more direct than that.

University Policies

29. The University did not put into evidence, nor did it rely on in argument, any policy or any procedural rules adopted by a faculty council and approved by Senate within the meaning of the collective agreement.

30. I swear this affidavit for the purposes of this judicial review application, and for no other or improper purpose.

Sworn/Affirmed before me at
the City of Ottawa,
in the Province of Ontario,
On April 30th, 2014.

Commissioner for Taking Affidavits
Leslie Robertson

NATASHA UDELL

37

ASSOCIATION OF PROFESSORS OF THE UNIVERSITY OF OTTAWA (APUO)

Applicant

- and -

UNIVERSITY OF OTTAWA

Respondent

Court File No. 14-

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceeding commenced at OTTAWA

AFFIDAVIT OF NATASHA UDELL

NELLIGAN O'BRIEN PAYNE LLP
Lawyers/Patent and Trade-Mark Agents
1500 – 50 O'Connor Street
Ottawa, Ontario
K1P 6L2

Sean T. McGee
Lawyers for the Applicant

Courthouse Box No. 285